No. 84-1176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, OCCIDENTAL CHEMICAL CORPORATION and THE BROOKLYN UNION GAS COMPANY,

Appellees.

On Appeal From the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

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Appellee, The Brooklyn Union Gas Company ("Brooklyn Union"), hereby moves the Court for an order dismissing the appeal herein or, in the alternative, affirming the judgment of the Court of Appeals of the State of New York on the ground that it is manifest that the questions on which the decision of the Court depends are so insubstantial as not to require further argument.

STATEMENT OF BROOKLYN UNION'S INTEREST

Brooklyn Union was granted leave to intervene in the present case by order of the Appellate Division, Third Department of the Supreme Court of the State of New York, in the Appellate Division proceeding on July 13, 1983. Brooklyn Union is a utility subject to the comprehensive regulatory supervision of appellee, the Public Service Commission of the State of New York ("PSC"), and is engaged primarily in the purchase, manufacturing and distribution at retail of natural and synthetic gas in a territory consisting of the Boroughs of Brooklyn and Staten Island, and a portion of the Borough of Queens, all located within The City of New York, and which contains a population of approximately 4 million. Brooklyn Union presently provides gas service to a number of cogeneration customers who use gas turbines, steam turbines and dual-fuel engines to produce electricity and heat for process use and/or heating and cooling (cogeneration facilities). Brooklyn Union's wholly owned subsidiary, Methane Development Corporation, is involved in the extraction of methane from sanitary municipal waste landfills, and may become involved in other alternate energy production activities in the future.

Appellant, Consolidated Edison Company of New York, Inc. ("Con Edison"), like Brooklyn Union, is a utility subject to the comprehensive regulatory supervision of the PSC. Con Edison provides retail electric service in all of Brooklyn Union's gas service territory. Brooklyn Union and its ratepayers directly are affected by the decision of this Court in this case as it will establish the terms and conditions for the purchase of electricity by electric utilities in New York State, including Con Edison, of electricity generated by cogeneration and alternate energy production facilities. Further, Brooklyn Union's interest

is predicated upon its active role in encouraging the development of cogeneration and alternate energy production facilities in its service territory.

STATEMENT OF THE CASE

For the purpose of brevity, Brooklyn Union refers the Court to Appellant's Statement of the Case contained at pages 3-10 of its Jurisdictional Statement ("J.S.") which, except as noted and corrected below, presents an adequate description of the present case.

First, Con Edison fails to note that the Federal Energy Regulatory Commission ("FERC") interpreted its role under section 210 of PURPA (16 U.S.C. § 824a-3 ("Section 210")) prior to the enactment of section 66-c(1) of the New York Public Service Law ("Section 66-c(1)"). In the Preamble to FERC's regulations (45 Fed. Reg. 12214, 12221-12222; 18 C.F.R. § 292.304 Rates for Purchases—Relation to State Programs ("Preamble")), FERC left the States free to utilize their own means of encouraging alternate energy production, stating:

> The Commission has become aware that several States have enacted legislation requiring electric utilities in that State to purchase the electrical output of facilities • • • at rates which may differ from the rates required under the Commission's rules implementing section 210 of PURPA.
>
> This Commission has set the rate for purchases at a level which it believes appropriate to encourage cogeneration and small power production, as required by section 210 of PURPA. While the rules prescribed under section 210 of PURPA are subject to the statutory parameters, *the States are*

free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these technologies. However, State laws or regulations which would provide rates lower than the federal standards would fail to provide the requisite encouragement to these technologies, and must yield to federal law.

If a State program were to provide that electric utilities must purchase power from certain types of facilities, among which are included "qualifying facilities," at a rate higher than that provided by these rules, a qualifying facility might seek to obtain the benefits of that State program. In such a case, however, the higher rates would be based on State authority to establish such rates, and not on the Commission rules.

• • •

> The Commission finds no inconsistency in a facility's taking advantage of section 210 in order to obtain one of its benefits, while relying on other authority under which to buy from or sell to a utility.

Preamble, 45 Fed. Reg. at 12221-12222 (emphases added).

Con Edison (J.S. at 4) contends that Congress intended to limit the encouragement of cogeneration and small power production facilities by placing a ceiling on the rates of purchases from such facilities. Con Edison would elevate Congressional concern regarding ratepayer subsidization of cogeneration under the federal scheme to the overriding purpose of PURPA, preempting all state legislation seeking furth r to encourage cogeneration. The

paramount purpose of Section 210 is to "encourage cogeneration and small power production." 16 U.S.C. § 824-3(a). Further, Con Edison fails to note that any Congressional limitation upon the ability to establish purchase rates from cogeneration and small power production facilities in excess of avoided cost is only applicable to rules "prescribed [by FERC] *under this subsection (a) of this section.*" 16 U.S.C. § 824a-3(b) (emphasis added). The express language of Section 210 and its attendant legislative history is devoid of any authority supporting Con Edison's contention that Section 210 proscribes independent state legislation enacted to encourage cogeneration and alternate energy development to an extent greater than that permitted FERC under Section 210.

Second, although Con Edison claims that "[g]enerally, state qualifying facilities will constitute qualifying cogeneration . . . facilities under PURPA" (J.S. at 6 n.•), it fails to note a key distinction between New York's statutory framework for qualifying cogeneration facilities and that established under PURPA and FERC's regulations. Subsection 2-a of section 2 of the New York Public Service Law provides that a state qualifying cogeneration facility can be fueled by oil "to the extent any such oil fueled facility was fueled by oil prior to the effective date of this subdivision and there is no increase in the amount of oil used at the facility or to the extent oil is used as a back-up fuel for such facility." N.Y. Pub. Serv. Law § 2(2-a) (McKinney Supp. 1984). Thus, while a new cogeneration facility that burns oil as its primary fuel source can qualify under the federal scheme, assuming it meets applicable efficiency standards (*see* 18 C.F.R. § 292.205(a)(2),(b)(1)), such a facility cannot qualify under the state scheme. This result fully comports with the legislative intent in enacting Section 66-c(1). In his memorandum accompanying the enactment of the March 1981 amend-

ments to Section 66-c(1), State Senator Dale Volker, the sponsor of the legislation enacting Section 66-c(1) and its subsequent amendments, stated that these amendments were intended to reduce New York's "overwhelming reliance on oil as an energy source." *Memorandum of State Senator Dale M. Volker, reprinted in* New York State Legislative Annual 443 (1981). Additionally, New York's *State Energy Master Plan* ("SEMP I"), promulgated in 1980, identified the State's dependence on imported oil as one of the more serious energy problems facing the State, indicating that electric generating capacity in the State, *to a greater extent than in other areas of the country,* was oil-fired. In discussing New York State's energy needs, SEMP I noted that:

> The State's consumption of petroleum products must be reduced. The economic costs and vulnerability to disruption resulting from the State's continued disproportionate reliance on oil strongly support actions to shift to less costly and/or more secure energy sources.
>
> The State's petroleum dependence exceeds the national average by 20 percentage points (66% vs. 46%). Over 70 percent of New York's petroleum is imported either as refined product or crude oil. Nearly 90 percent of the petroleum products consumed in the electric utility sector (primarily residual oil) are refined from foreign crude oil. *New York consumes more OPEC oil than any other state. Thus among all States, New York is most vulnerable economically to increases in world oil prices and the political instability of its supply.*

N.Y. State Energy Master Plan (*Final Report,* March 1980) (emphasis added).

ARGUMENT

CON EDISON'S APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

A. The Facts Of The Present Case Do Not Present A Substantial Federal Question.

Con Edison, in that part of its Jurisdictional Statement in which it argues substantiality, misstates the nature of this case. Con Edison states (J.S. at 11) that "the importance of *the federal program at issue*" has been recognized by this Court. Indeed, this Court has noted the importance of PURPA. However, PURPA is not at issue in the present case and no party challenges the validity of Section 210. Rather, what is at issue here is the Congressional intent that PURPA coexist with an independent but compatible state program for encouraging the development of alternate sources of electricity. Further, this case does not involve the "implementation of this [federal] program" (J.S. at 11) or the "implementation of a major national energy program." J.S. at 10. Rather, this case involves the implementation of a state cogeneration and alternate energy production program having statewide application pursuant to independent state legislation supplementing and complementing Section 210 and FERC's rules promulgated pursuant to Section 210.

In an unavailing attempt to satisfy this Court's standards for plenary review, Con Edison, apparently unsatisfied with the facts of the present case, and in recognition of the insubstantiality of its legal arguments, has engaged in rank speculation, unsupported by the record below or reality, to envelope this case with an economic importance in hopes of raising the spectre of substantiality. Con Edison (J.S. at 11) arrives at a fanciful $1.1 billion annual

ratepayer subsidy of cogeneration based upon a FERC estimate of nationwide cogeneration production in 1995. Such an ephemeral figure is arrived at only through the use of conjecture and surmise. Indeed, in order to arrive at such a figure, Con Edison must make several precarious and unsupportable assumptions. First, Con Edison assumes that New York's six cent per kilowatt hour minimum purchase rate is now and at all times in the future until 1995 will be about two cents per kilowatt hour higher than *any* utility's avoided cost. However, all Con Edison has established is that *at times,* the minimum purchase rate is above *Con Edison's current* avoided cost. Further, Con Edison's "billion dollar" figure assumes that New York's minimum price requirement has nationwide and not statewide application. Finally, FERC's estimate of future cogeneration development is speculative at best and such predicted development would be severely impaired by a determination that its interpretation of PURPA contained in the Preamble and relied upon by at least ten states, was in error, and that the States may not encourage cogeneration and alternate energy production through independent legislation or regulation tailored to meet the specific needs of each State in advancing a traditional state interest, *i.e.,* insuring an adequate and secure supply of energy to its residents at reasonable prices.

In point of fact, the present case provides little or no *factual* support for a finding of substantiality. Con Edison presently obtains a negligible portion of its entire electrical energy requirements from cogeneration and alternate power production facilities. Furthermore, the vast majority of Con Edison's electricity sales are retail in nature and thus subject to traditional state regulation. Thus, it stands to reason that, as to that insignificant portion of Con Edison's total electrical output representing

purchases from cogeneration and alternate power production facilities, the vast majority of such purchased power is sold by Con Edison at retail to New York residents. The reasonableness of the retail rates charged to Con Edison's customers is within the purview of the Public Service Commission and thus a traditional state concern presenting no substantial federal question. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 569 (1980). Hence, an infinitesimal portion of Con Edison's cogeneration or alternate energy supplied electricity will be sold at wholesale by Con Edison and therefore within the federal regulatory domain. Therefore, the traditional federal interest with regard to the effect that the six cent minimum purchase price will have on the rate charged for the subsequent sale of such purchased power by Con Edison is now and will be for the forseeable future, in all respects, *de minimis.*[1]

B. Con Edison's Jurisdictional Statement Fails To Establish a Substantial Federal Question Meriting Plenary Review.

As noted above, through the use of a hypothetical scenario replete with fallacious assumptions and unsubstantiated numbers, Con Edison seeks to inject an economic importance into the present case in order to establish an important or substantial federal question. Con Edison also

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[1] Moreover, Con Edison's reference (J.S. at 12) to a quote appearing in Energy User News, to the effect that this case may have "national implications," does nothing to bolster its claim of substantiality. Surely, this Court's carefully considered requirements for allowing plenary review of appeals cannot be satisfied by the scratching of a journalist's pen.

attempts to create a substantial federal question by looking outside the facts of the present case and ignoring the determinative legal principles herein involved.

1. The Kansas City Power holding does not create a substantial federal question.

Con Edison argues that plenary review is warranted because the decision of the New York Court of Appeals conflicts with a decision of the Supreme Court of Kansas. J.S. at 13. Con Edison's reliance upon *Kansas City Power & Light Co.* v. *State Corp. Commission,* 234 Kan. 1052, 676 P.2d 764 (1984), is, at best, questionable. First, the *Kansas City Power* decision relies in part upon the Appellate Division decision in this case, which was subsequently reversed by the Court of Appeals. *See* 676 P.2d at 768. Second, the court in *Kansas City Power* considered a wholly different statutory scheme in that no minimum purchase rate was established, nor were any different criteria required for qualification as a state cogeneration facility. Third, the *Kansas City Power* decision is of dubious precedential or persuasive value, because a careful reading of the decision suggests that the Kansas Supreme Court apparently misinterpreted FERC's cogeneration regulations. There, the court stated that FERC's regulations require that a state regulatory agency obtain a FERC waiver in order to establish a purchase price under FERC regulations *at above avoided cost.* 676 P.2d at 768. However, FERC's regulations contemplate that a waiver may be obtained where the purchase rate will be *less than avoided cost.* These regulations provide that FERC may grant a waiver upon a showing by the state regulatory authority "that compliance with any of the requirements of Subpart C [governing purchase and sale

arrangements between qualifying facilities and utilities] is not necessary to encourage cogeneration and small power production and is not otherwise required under Section 210 of PURPA." 18 C.F.R. § 292.403(b). This rule clearly is inapplicable to a purchase rate prescribed by a State under its own authority which exceeds avoided cost and thus, consistent with the language in the Preamble, provides *more* encouragement of cogeneration than FERC's rule mandates.

2. Con Edison's citation of the actions of other States merely undercuts its own arguments.

In search of a substantial federal question, Con Edison also provides the Court with an impressive array of statutes and regulatory rulings from ten other States (J.S. at 12) each of which purportedly permits the applicable state regulatory authority to establish purchase rates for cogeneration supplied electricity in excess of avoided cost. These dissimilar statutes and rulings are of little consequence because the *sole subject of this case is New York's statutory minimum purchase rate.* The case before the Court does not involve a review of the various price formulae employed by different states to encourage cogeneration. Rather, this case concerns the compatibility of Section 66-c(1) and Section 210. The only value that these other States' statutes and rulings provide in this proceeding *is support for Brooklyn Union's claim that Con Edison's preemption argument* (*see* J.S. at 13-20) *is meritless.* These state determinations are consistent with the interpretations of the New York Court of Appeals, the PSC and FERC as expressed in the Preamble, that the overriding and preeminent purpose of Section 210 is the encouragement of cogeneration and alternate energy produc-

tion and that the federal statutory restriction against purchase prices in excess of avoided cost is applicable only to federally qualifying facilities and to States *acting pursuant to FERC's rules.* It is apparent that numerous other States have reviewed and interpreted Section 210 in a manner consistent with FERC's interpretation and in fact relied on that interpretation, and thus have determined that the federal legislation is limited in scope and does not preempt separate state legislation in furtherance of the primary goal of PURPA and independent yet consistent state goals.

3. *The holding of the court below considers a narrowly drawn New York statute designed to advance federal and state objectives.*

Con Edison attempts to paint the decision of the New York Court of Appeals with a nationwide brush. However, the New York six cent minimum purchase rate considered by the Court of Appeals is a carefully considered, narrowly drawn provision designed to provide a modest benefit to a specific class of on-site generators—*state qualifying* cogeneration and alternate energy production facilities developed on or after June 26, 1980. Thus, the New York statutory scheme essentially makes the six cent minimum purchase rate available only to non-oil burning facilities that qualify under both the state and federal statutes,[2] in furtherance of the national objective of encouraging on-site generation and reducing dependence on fossil fuels, *and* New York's own special objective of

[2] In another aspect of the decision below, the Court of Appeals held that the State had no authority to require electric utilities to purchase power from non-federally qualifying facilities. Review of that portion of the court's opinion has not been sought by any party.

reducing the dependence of its electric generating facilities on imported oil. *See supra* at 6. This is the very type of legislation which FERC sought to encourage in the Preamble. Hence, the Court of Appeals' holding that "the language of PURPA and its legislative history indicate that the PURPA avoided cost rate is only the maximum in the . . . *federal* government's role in encouraging alternate power production," (Appendix to Con Edison's Jurisdictional Statement ("App.") at 8a), and that the state and federal statutes seek to encourage the development of alternate energy production (App. at 10a), merely confirms the constitutionality only of the specific statutory provision under scrutiny, and cannot be read as a blanket endorsement of all state statutes in force now, or that may be enacted in the future, which may provide for purchase rates in excess of the Section 210 ceiling for *all* federal qualifying facilities.[3]

4. *Neither FERC* v. *Mississippi nor American Paper Institute, Inc.* v. *American Electric Power Service Corp. is inconsistent with the opinion of the court below.*

Con Edison (J.S. at 13) also asserts the existence of a substantial federal question because the New York Court of Appeals "misconstrues this Court's decisions in *FERC* v. *Mississippi* and [*American Paper Institute, Inc.* v. *American Electric Power Service Corp.*]." Brooklyn

[3] Indeed, in the underlying decision implementing Section 210 *and* Section 66-c(1), the PSC recognized that "to the extent that a facility qualifies under FERC's regulations to sell power to a utility at its avoided costs does *not* qualify, under § 66-c of the Public Service Law, to sell power for no less than 6¢ /kwh, *only the avoided cost rate applies.*" (App. at 84a) (emphases added, footnote omitted).

Union submits that the decision below is in full accord with these recent decisions of this Court, and in fact the New York Court of Appeals expressly refers to and relies upon both decisions in its opinion.

Neither *FERC* v. *Mississippi,* 456 U.S. 742, *reh'g denied,* 458 U.S. 1131 (1982) ("*Mississippi*"), nor *American Paper Institute, Inc.* v. *American Electric Power Service Corp.,* 461 U.S. 402 (1983) ("*AEP*") provide any support for Con Edison's claim that Section 210 prevents New York from enacting independent legislation to promote cogeneration to a greater extent than FERC is permitted to do on a nationwide basis.

Rather, *Mississippi* supports the finding of the court below that Congress did not intend to preempt state activity in the cogeneration development field. There, this Court described PURPA as "limited federal regulation of retail sales of electricity and natural gas, and of relationships between cogenerators and electric utilities." 456 U.S. at 758. In *Mississippi,* this Court held that PURPA was constitutional, not that it barred complementary state action.[4]

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[4] In fact, in *Mississippi,* the Court (456 U.S. at 767) quoted with approval its holding in *Hodel* v. *Virginia Surface Mining & Recl. Ass'n,* 452 U.S. 264, 289:

> The most that can be said is that the . . . Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.

As discussed *supra,* the minimum purchase rate contained in Section 66-c(1) is a narrowly drawn effort to structure New York's regulatory program in a manner consistent with the federal program, and designed to meet New York's own particular needs.

Similarly, *AEP* serves only to support the decision of the court below that Congressional concern for ratepayers was *not* the preeminent purpose of PURPA. 461 U.S. at 415. Further, in *AEP* this Court noted that FERC's interpretation of PURPA, as the agency responsible for implementing the legislation, should be granted deference. 461 U.S. at 422-23. Hence, it is unquestionable that the decision below is fully consistent with this Court's recent decisions regarding PURPA, and in no way "misconstrues" those decisions.

For the above reasons, it is submitted that Con Edison wholly has failed to establish the presence of a substantial federal question warranting plenary consideration of the present case.

THE NEW YORK COURT OF APPEALS' DETERMINATION THAT SECTION 210 DOES NOT PREEMPT NEW YORK FROM REQUIRING ELECTRIC UTILITIES TO PAY A MINIMUM RATE FOR PURCHASES OF ELECTRICITY FROM STATE QUALIFYING COGENERATION AND ALTERNATE ENERGY PRODUCTION FACILITIES IS CONSISTENT WITH THE CONGRESSIONAL INTENT, FERC'S INTERPRETATION OF ITS ENABLING ACT, AND THE INTERPRETATION OF NUMEROUS OTHER STATES

A. Section 210 Does Not Preempt Section 66-c(1).

1. Federal preemption is not favored by the courts.

This Court has held that judicial analysis under the Supremacy Clause of the United States Constitution starts with the "basic assumption that Congress did not intend to displace state law." *Maryland* v. *Louisiana,* 451 U.S. 725, 746 (1981); *Chicago & North Western Transporta-*

tion Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). This presumption against federal preemption is even greater when a finding of preemption would displace and infringe upon areas traditionally and consistently regulated by the States. *Pacific Gas & Electric Co.* v. *State Energy Resources and Development Commission*, 461 U.S. 190, 206 (1983); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See also Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525, *reh'g denied*, 431 U.S. 925 (1977).

A strong presumption against preemption exists in the present case. Section 66-c(1) specifically aims "to encourage the development of alternate energy production facilities, cogeneration facilities and small hydro facilities" by requiring electric utilities to purchase excess power produced by newly developed state qualifying facilities at a minimum rate of six cents per kilowatt hour. This Court has recognized and characterized State regulation of utilities as "one of the most important of the functions traditionally associated with the police powers of the States." *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983) (citing *Munn* v. *Illinois*, 94 U.S. 113 (1877)). The Court has held further that the States have exclusive authority over the need for new power generating facilities, the economic feasibility of such plants and the retail rates to be charged by utilities and services to be provided. *Pacific Gas & Electric Co.*, 461 U.S. at 205; *see also Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 569 (1980) ("[t]he State's concern that rates be fair and efficient represents a clear and substantial governmental interest.").

2. No express federal preemption is present.

As the court below recognized (App. at 6a), a holding that a state statute is preempted by federal law must be supported either by an explicit statutory command to that effect (*Jones* v. *Rath Packing Co.*, 430 U.S. at 525), or a finding of "implied" preemption. *See Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Express statutory language providing for preemption generally is required before the States will be preempted from acting in areas of traditional state concern such as regulation of utilities. *See New York Department of Social Services* v. *Dublino*, 413 U.S. 405, 413-14 (1973) ("It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so.") quoting *Schwartz* v. *Texas*, 344 U.S. 199, 202-03 (1952); *Florida Lime & Avocado Growers Inc.* v. *Paul*, 373 U.S. 132, 142 (1963) ("federal regulation of a field . . . should not be deemed preemptive of state regulatory power . . . [unless] the Congress has unmistakably so ordained.").

In its Jurisdictional Statement, Con Edison does not take issue with the finding of the court below (App. at 8a) that Congress did not expressly provide that Section 210 preempts the States from setting purchase rates in excess of avoided costs to further both the primary federal objective underlying PURPA and independent, but compatible state objectives. Neither does Con Edison allege that Section 66-c(1) does not involve an area historically within the police power of the States. Hence, the absence of any express statutory language to the contrary clearly indicates that Section 210 was not intended to preempt New York from requiring utilities to purchase power from state

qualifying cogeneration and alternate energy production facilities at a minimum of six cents per kilowatt hour. However, even if the Court should find that Section 66-c(1) does not attempt to regulate in an area of traditional state concern, which it does, the New York law nevertheless withstands preemption scrutiny since the facts of this case do not even support a finding of *implied* preemption.

3. *The factors necessary to support a finding of "implied" federal preemption are not present.*

This Court has held that a Congressional intent to preempt will be "inferred" if:

> [1] The scheme of federal regulation [is] so persuasive as to make reasonable the inference that Congress left no room for the States to supplement it [or 2] the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject [or 3] the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose [or 4] the state policy may produce a result inconsistent with the object of the federal statute.

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *accord Pacific Gas & Electric Co.*, 461 U.S. at 204; *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982) (citations omitted).

Preemption cannot be implied here on the basis of the pervasively federal nature of the statutory scheme involved. Much to the contrary, this Court has characterized Section 210 as "*limited* federal regulation . . . of relationships between cogenerators and electric utilities. . . ." *Mississippi*, 456 U.S. at 758 (emphasis added). This Court's discussion in *Mississippi* of the purpose and structure of Section 210 further negates any argument that PURPA leaves no room for complementary legislation by the States, by revealing that Congress envisioned PURPA to be a cooperative venture between the federal government and the States to encourage cogeneration and small power production facilities, to conserve finite and expensive energy resources, and to provide for their most efficient utilization. *Id.* at 750-51.

The second and third bases for inferring preemption, both of which require a finding of a federal interest and objective so dominant and overriding as to preclude the States from acting in the field, similarly are not present here. As noted above, Section 210 embodies only a very limited federal role and requires a joint effort between the federal government and the States to encourage cogeneration. Thus, the clear implication is that the federal interest and objective underlying Section 210 was *not* intended to override those of the individual States. Moreover, the fact that Congress left to the States the task of implementing, enforcing and administering the program (*see* 16 U.S.C. § 824a-3(a), (e), (f), (g)) establishes without doubt that PURPA was designed expressly to allow the States to participate and regulate in the area of encouragement of cogeneration.

The undisputed recognition that the States have a paramount interest in regulating electrical utilities for determining questions of cost and the need for new power generating facilities (*Pacific Gas & Electric Co.*, 461 U.S. at 205-06; *see Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. at 569) establishes unequivocally that the federal interest in the present case is not so dominant as to allow preemption to be inferred.

The only remaining circumstance supporting an inference of a Congressional intent to preempt state law is if "the state policy may produce a result inconsistent with the objective of the federal statute." Preemption may not be inferred here on this basis however, because as the Court of Appeals correctly noted, there clearly is no inconsistency between either the rate requirements set forth in Section 210 and Section 66-c(1), or the objectives sought to be furthered by the enactment and enforcement of each provision.

Finally, the plain language and legislative history of Section 210, as well as the regulations issued thereunder by FERC, establish that PURPA's maximum purchase rate is neither in direct or indirect conflict nor inconsistent with New York's minimum purchase rate. As the Court of Appeals observed (App. at 8a), Section 210(b) provides that "[n]o such rule prescribed under subsection (a) *of this section* shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." (Emphasis added). In the *Joint Explanatory Statement of the Committee of Conference* ("*Joint Explanatory Statement*") on PURPA, the conferees pointed out that a FERC regulation setting the purchase rate at avoided costs is only "meant to act as an upper limit on the price at which utilities can be required *under this section* to purchase electric energy." H.R. Rep. No. 95-1750, 95th Cong., 2d Sess. 98, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7797, 7832 (emphasis added).[5] The fact that both the statute and legislative history use

[5] Moreover, section 292.304(a)(2) of FERC's regulations provides that "[n]othing *in this subpart* requires any electric utility to pay more than the avoided costs for purchases." 18 C.F.R. § 292.304 (a)(2) (emphasis added).

the limiting language "under this section" when referring to the ceiling rate prescribed under PURPA, coupled with the complete absence of any indication in the statute or the legislative history that Congress intended that the prescription of purchase rates would be an exclusively federal responsibility, is compelling proof that PURPA's avoided cost rate ceiling applies only within the context of the federal regulatory scheme to encourage cogeneration, and that New York's established higher minimum rate is not in direct or indirect conflict with Section 210.[6]

In fact, not only is it obvious that Section 210 and Section 66-c(1) are not inconsistent, it is abundantly clear that they are in fact perfectly consistent and complementary. As the court below recognized (App. at 10a-11a), the primary purpose of both the federal and state statutes in question here is the encouragement of the development of cogeneration and other forms of alternative energy production, with a corresponding reduction in the nation's energy dependence on fossil fuels. *See Joint Explanatory Statement,* 1978 U.S. CODE CONG. & AD. NEWS at 7831-32; N.Y. Pub. Serv. Law § 66-c(1) (McKinney Supp. 1984).

[6] Con Edison attacks the reasoning of the court below, which held Section 210 and Section 66-c(1) to be complementary parts of a cooperative federal-state effort to encourage cogeneration and alternative energy production, by accusing that court of "a fundamental misunderstanding of the structure of PURPA." J.S. at 15. However, Con Edison's arguments, unsupported by reference to judicial or statutory authority, can be taken only as Con Edison's own views of the "structure of PURPA." Certainly, this Court should be cognizant that the views of electric utilities such as Con Edison, whose very historical reluctance to purchase power from and provide backup power to cogeneration facilities gave rise to the need for Section 210 in the first place (*see Mississippi,* 456 U.S. at 750), as to the "structure of PURPA," or the objectives of that act, must be considered suspect.

However, Con Edison goes to great lengths (*see* J.S. at 16-20) to argue that Section 66-c(1) is preempted because it frustrates what *Con Edison* would characterize as an equally important purpose of Section 210—the avoidance of ratepayer subsidies of alternative energy producers—by requiring utilities to purchase power from cogeneration facilities at a rate that at times would exceed their avoided cost. As the review of the legislative history of Section 210 conducted by the court below clearly indicates (*see* App. at 8a), the concern over the level of rates at which utilities should purchase power from qualifying federal cogeneration facilities is *secondary* to the *primary* objective of encouraging congeneration and alternative energy production:

> Cogeneration is to be encouraged under this section and therefore the examination of the level of rates which should apply to the purchase by the utility of the cogenerator's or small power producer's power should not be burdened by the same examination as are utility rate applications, but rather in a less burdensome manner. . . .

Joint Explanatory Statement, 1978 U.S. Code Cong. & Ad. News at 7831-32.

Moreover, this Court held in *AEP,* a case specifically dealing with the purchase rate requirement set by FERC under PURPA, that the primary purpose of the federal statute is to encourage the development of congeneration facilities, and that a failure to achieve consumer rate savings does not thwart the important objective of the law. 461 U.S. at 417-18. Therefore, it is clear that Section 66-c (1), which sets a minimum purchase rate applicable to state qualifying facilities which at times may be higher than Con Edison's full avoided cost, does not conflict with,

and in fact enhances, both its primary purpose and that of PURPA, as well as the unique and specific state objective discussed *supra* at 6.

B. FERC, The Agency Charged With The Implementation Of PURPA, Determined That The States Are Not Preempted From Setting Purchase Rates That Further Encourage Cogeneration.

That Section 66-c(1) is not preempted by Section 210 further is supported by the fact that FERC has interpreted Section 210 as permitting separate state regulation prescribing purchase rates in excess of full avoided costs. As discussed *supra,* FERC, the agency charged with the implementation of PURPA, specifically indicates in the Preamble that PURPA did not preempt the States from enacting laws or promulgating regulations setting higher rates at which utilities must purchase power from cogeneration facilities.

In that Preamble, FERC noted the scope and extent to which the States, *under their own authority,* may enact rules providing for rates higher than full avoided cost:

> While the rules prescribed under section 210 of PURPA are subject to the statutory parameters, *the States are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these technologies.* However, State laws or regulations which would provide rates lower than the federal standards would fail to provide the requisite encouragement to these technologies, and must yield to federal law.

45 Fed. Reg. at 12221 (emphasis added).

As the court below held (App. at 9a-10a), an agency's interpretation of its own enabling statute is entitled to great deference by the courts. *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978). This is especially true where, as here, the subject matter is within the agency's area of specialization and the interpretation involves a "contemporaneous construction" of the statute. *Udall* v. *Tallman,* 380 U.S. 1, 16, *reh'g denied,* 380 U.S. 989 (1965). A court, charged with reviewing FERC's interpretation of PURPA, need only determine whether the Commission's construction was sufficiently reasonable. *FEC* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 39 (1981); *Train* v. *Natural Resources Defense Council, Inc.,* 421 U.S. 60, 75 (1975). "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *FEC* v. *Democratic Senatorial Campaign Committee,* 454 U.S. at 39; *Udall* v. *Tallman,* 380 U.S. at 16.

Here FERC, the agency with both the expertise and, without doubt, the best understanding of the federal government's role in the field of energy regulation,[7] has determined that PURPA leaves room for the States further to encourage cogeneration by setting higher rates at which utilities will be required to purchase power from cogeneration and alternate energy production facilities.

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[7] *See, e.g., Ashland Exploration, Inc.* v. *FERC,* 631 F.2d 1018, 1022-23 (D.C. Cir. 1980), *cert. denied,* 450 U.S. 915 (1981); *see also Permian Basin Area Rate Cases,* 390 U.S. 747, 766-67, *reh'g denied,* 392 U.S. 917 (1968) (In discussing FERC's predecessor, the Federal Power Commission, this Court noted that "Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts.").

Given (1) that this Court has determined that the primary objective of PURPA is to encourage cogeneration and other alternate energy production facilities, even to the detriment of consumer rate savings (*see AEP,* 461 U.S. at 415-18), and (2) that the regulatory scheme of PURPA envisions a cooperative effort between the federal government and the States (*see Mississippi,* 456 U.S. at 750-51, 767), it is evident that the opinion of the court below, in holding that FERC's interpretation that Section 210 does not preempt the establishment of state minimum purchase rates in excess of full avoided costs, is not only reasonable, but correct, and should be affirmed summarily.

Con Edison's blithe dismissal of FERC's interpretation (*see* J.S. at 18n.*), and the cases cited as support for its arguments on this point, reveal the inherent frailty of Con Edison's position. First, Con Edison claims that FERC's interpretation is entitled to no deference because it is inconsistent with the statute and Congressional purpose. Of course, this tautological argument ignores the fact that the cases cited by the court below on the deference rule require that the presumption that an agency's interpretation of its own enabling statute is correct be overcome by a clear and convincing showing that it is incorrect. *See Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969) ("The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."). Clearly, the Court of Appeals' holding implied that Con Edison's arguments were neither convincing nor compelling, and no different showing is evident in Con Edison's Jurisdictional Statement. Con Edison's other argument, that FERC, in the Preamble, did not grasp "the questions involved in reaching its conclusion" is incredible in the face of the clear language in the Preamble indicating that FERC (1) was "aware that several States have enacted

legislation requiring electric utilities in that State to purchase the electrical output of facilities . . . *at rates that differ from the rates required under* [*FERC's*] *rules implementing Section 210 of PURPA*" (emphasis added), (2) recognized that "the States are free, under their own authority, to enact laws or regulations which would result in even greater encouragement of these technologies," and (3) acknowledged that a State's program could provide that electric utilities "purchase power from certain types of facilities, among which are included 'qualifying facilities,' at a rate higher than that provided by these rules . . . based on State authority to establish such rates . . . . " Hence, any argument that despite this language, FERC did not grasp the questions involved, is so nonsensical as to be unworthy of this Court's consideration.

CONCLUSION

For all of the foregoing reasons, and those contained in the decision below, Brooklyn Union respectfully urges the Court to dismiss the appeal herein for want of a substantial federal question, or in the alternative to affirm summarily the decision appealed from.

Respectfully submitted,

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APPENDIX

Listing Pursuant to Rule 28.1

The Brooklyn Union Gas Company has no parent corporations. It has the following non-wholly owned subsidiary corporations:

Honeoye Storage Corporation
Boundary Gas Corporation

It has the following affiliated corporations:

Tri-State Well Service, Inc.
BHP Energy, Inc.

It has no other affiliates.